In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1902.

The San Jose Land & Water Company,
Plaintiff in Error,
vs.
The San Jose Ranch Company,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The Court has Jurisdiction of This Cause:

In his argument, the learned counsel for the defendant in error does not contend that there was no federal question involved in the decision of this case by the lower court, but that it was not "set up or claimed" by the plaintiff in error in the court below; and he relies mainly in support of his contention upon the apparent theory that only the pleadings can be considered as part of the record, and that there is no distinction between those cases where the absolute silence of the record as to a federal question renders necessary an inquiry as to whether such a question was or was not necessarily involved, and those in which the record affirmatively shows, though not necessarily in the pleadings, that such a question was directly in-

volved and was the sole question involved and decided.

The court's opinion upon writ of error from the decision of the highest judicial tribunal of the state is part of the record.

Cousin v. Labatere, 19 How., 202; 15 L. Ed. 601;

Murdoch v. Memphis, 20 Wall., 633; 22 L. Ed. 443;

Gross v. U. S. Mtg. Co., 108 U. S., 485; 27 L. Ed. 795;

Philadelphia Fire Ass'n. v. N. Y., 119 U. S. 116; 30 L. Ed. 346;

Creiger v. Shelby Ry. Co., 125 U. S. 44; 31 L. Ed. 678;

Skuder v. Comptroller, 175 U. S. 36.

The jurisdictional test in cases of this character is not that which is claimed by counsel for defendant in error. The true rule is that to bring the federal question for decision to this court, "it must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it and their decision against the right claimed under it."

Maxwell v. Newbold, 59 U. S., 18 How. 15; 15 L. Ed. 506-508;

In Sully v. American National Bank, 178 U. S. 289; 44 L. Ed. 1072, this court said:

> "In regard to the objection that even Cahart has raised the question too late, we think it is without foundation. He raised it in the Supreme Court, and that court decided it against him, not on the ground that he had not raised it in the lower court, but on its merits, and for the reason that in the judgment of the Supreme Court the statute was a valid and constitutional exercise of the legislative powers of the state." [L. Ed., p. 1076].

In Gross v. U. S. Mtg. Co., *supra,* Mr. Justice Harlan, who delivered the opinion of this court, said:

> "The first point to be considered relates to the jurisdiction of this court. In behalf of the defendant in error, it is insisted that it does not appear from the record that the decision of the Supreme Court of Illinois was adverse in asserting the right under the constitution, laws or treaties of the United States, nor that the judgment nor decree complained of could not have been passed without the determination of any special federal question. (Citing authorities). This proposition depends upon the inquiry whether the opinion of the State Court, which is made part of the transcript, can be examined for the purpose of ascertaining the grounds upon which the court based its final decree."
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> [27 L. Ed. 797].

The court then proceeded to examine the authorities touching upon the question as to its right to consider the decision of the State Court for the purpose of ascertaining what was involved in the controversy, and held that it had the right to so consider it. Upon that consideration it determined that a federal question as involved, and entertained jurisdiction.

In Philadelphia Fire Ass'n. v. N. Y., *supra,* where there were no pleadings, but where the case was submitted upon an agreed statement of facts, the court said:

> "The defendant claims here the benefit of the 14th amendment, and the question has occurred as to whether the record presents that point for our review. There being no pleadings, the obvious place to look for the claim would be the agreed statement of facts, but all that is there said is that the defendant insists that the statute is 'unconstitutional and void, and not a legitimate exercise of power.' The question was considered in both the Supreme Court and the court of ap-

peals as to the validity of the statute under the Constitution of New York as being a law made to depend for its operation on the legislation of a foreign state, and thus an illegitimate exercise of the legislative power. This contention is fairly within the words of the agreed statement, and if it depended wholly on that statement to determine whether the record raises a federal question, some doubt might exist, but in view of what was said in Murdock v. Memphis, 20 Wall. 590-633, in Gross v. U. S. Mtg. Co. 108 U. S. 477, and in Adams Co. v. Burlington & Mo. R. R. Co., 112 U. S. 123, we think that we are at liberty to look into the opinion of the Court of Appeals, a copy of which, duly authenticated by the proper officers, is transmitted to us with the record in compliance with our 8th rule, for the purpose of aiding and determining what was decided by that court."

[30 L. Ed., p. 346].

This was done, and the appeal determined upon its merits.

In the case of Sayward v. Dewey, 158 U. S. 180; 39 L. Ed. 941 and 942, Mr. Chief Justice Fuller, in delivering the opinion of this court, said:

"As the validity of no treaties or statute of or authority exercised under the United States, nor of a statute of or authority exercised under any state was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court and that the decision of the highest court of the state in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed, and in that record certain propositions must be regarded as settled.

"6. The right on which the party relies must have been called to the attention of the court in

some proper way and the decision of the court must have been against the right claimed.

Hoyt v. Thompson, 66 U. S., 1 Black 518;
Maxwell v. Newbold, 59 U. S., 18 How. 515.

"7. Or, at all events, it must appear from the record by clear and necessary intendment that the federal question was directly involved so that the State Court could not have given judgment without deciding it—that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision.

Powell v. Brunswick Co. Board of Supervisors, 150 U. S., 433-439."

This entire question was also pleaded, considered and decided contrary to the contention of counsel for respondent in error in the case of Meyers v. Richmond, 172 U. S., 82; 43 L. Ed., 374.

In the case of Dewey v. Des Moines, 173 U. S., 193; 43 L. Ed., 665-667, this court, while holding that no jurisdiction was shown in the record then before it, very clearly points out all that is necessary to confer jurisdiction. It there said:

"Although no particular form of words is necessary to be used in order that the federal questions may be set up involved within the meaning of the cases on this subject, there yet must be something in the case before the State court which at least would call its attention to the federal question as one that was relied on by the party, and then if the decision of the court while not noticing the question was such that the judgment was by its necessary effect, a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or such was its necessary effect in law. (Citing a number of cases.)

"In all these cases it did appear from the record

> that the rights were set up or claimed in such a way as to bring the subject to the attention of the State court. It is not enough that there may be somewhere hidden in the record a question which if raised would be of a federal nature. * * in order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States. In such case if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough; but the denial, whether expressed or implied, must be of some right or claim founded upon the constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below."

From these authorities it clearly appears, and it is the settled rule of this court, that where the record affirmatively shows that a federal question was raised —that is, that it was "set up" or "claimed"—whether that fact is deducible from the pleadings or from the judgment or from any other part of the record, it is sufficient to confer jurisdiction, and it is immaterial where, when, or how, it was raised, provided it was raised prior to the final judgment, and was determined and passed upon adversely in the final judgment.

In the case at bar, the record fully meets the requirements in this regard of the authorities. Waiving the fact that it fully appears from the findings that the plaintiff in error claimed certain rights or privileges under the federal statutes making grants to the Southern Pacific Railroad Company, and that the decision of the lower court was adverse to that claim, it fully and affirmatively and in terms appears from the decision of the Supreme Court of the State of California, found at folios 154 to 164 of the transcript, that the right

claimed and urged and presented in that court by the plaintiff in error was one founded solely upon a federal statute, and that court determined the right adversely to the claim of the plaintiff in error and gave the Federal statute a construction which was adverse to such claim.

Under these circumstances, there can be no question of doubt whatever as to the jurisdiction of this court in the case at bar. The merits of the controversy are fully discussed in our opening brief, and we see nothing in the argument of counsel for the respondent in error upon the merits to necessitate any further presentation of them here.

Respectfully submitted,

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Attorney for Plaintiff in Error.